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[*Delcore v. Northeast Nuclear Energy Co.*](#), 90-ERA-5 (ALJ Apr. 30, 1990)

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U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office
and Courthouse
Room 409
Boston, Massachusetts 02109

DATE: April 30, 1990
CASE NO. 90-ERA-5

IN THE MATTER OF

DONALD W. DELCORE
COMPLAINANT

against

NORTHEAST NUCLEAR ENERGY COMPANY
RESPONDENT

Frederick P. Amore, Esq.
For Complainant

Edward M. Richters, Esq.
For Respondent

BEFORE: ANTHONY J. IACOBO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DENYING COMPLAINT

This is a proceeding under the Energy Reorganization Act of 1974, as amended (the Act), 42 U.S.C. § 5851, and the implementing regulations found in 29 C.F.R. Part 24, whereby

employees of employers subject to the Act may file complaints and receive certain redress upon a showing of being subjected to discriminatory action resulting from protected activity. There was a prehearing conference on November 27, 1989, at which Complainant appeared *pro se*. A hearing was held on February 6 - 9, 1990, at which time the parties appeared, each represented by counsel, and were given the opportunity to present evidence and argument. Briefs were received.

Procedural History

This case stems from a complaint by Mr. DelCore dated August 31, 1989, wherein he alleges he was assessed one-half hour personal time when he acknowledged he arrived about "twenty minutes late for work." (ALJX 2, p. 2) DelCore subsequently complained that his supervisor threatened him with an adverse performance rating in "communicating" if he should persist in conveying his complaints to government agencies before or without communicating them to his supervisors.

The District Director of the Wage and Hour Division of the Employment Standards Administration of the Department of Labor (Wage and Hour), on October 30, 1989, reversing an earlier stance, concluded that Respondent (Northeast Nuclear Energy Company (NNEC)) treated Complainant "disimilarly from other employees regarding the crediting of leave time" due to prior protected activity. Respondent appeals this conclusion. The District Director, in a separate communication to Complainant, also concluded that the alleged threatened poor performance rating for "poor communications" was a proper exercise by a supervisor of his managerial responsibilities in demanding that he be kept abreast of any problems a subordinate believes are extant in the organization. It was concluded that management did not, by insisting on this degree of internal communication, thereby attempt to coerce Complainant into not reporting his concerns about discriminatory actions against him to one or more government agencies. Complainant appeals this conclusion by Wage and Hour. This proceeding is a *de novo* consideration of Mr. DelCore's complaints.

Basic Issue

The basic issue in this case is whether the Complainant, because of protected activity, was the subject of (a) prejudicial action in the assessment of personal time and (b)

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improper threat of retaliatory action for communicating with government agencies prior to contacting his supervisor. (TR 23)

Stipulations

The parties stipulated that Complainant is an employee of Respondent within the meaning of Section 210 of the Act, 42 U.S.C. § 5851, NNEC is an employer within the

meaning of the Act and a licensee of the Nuclear Regulatory Commission (NRC), the complaint and the requests for hearing were timely filed, and that I have jurisdiction. (TR 5)

Summary of the Evidence

Mr. Donald DelCore is an instrument specialist assigned to unit two at Millstone, a nuclear power plant owned and operated by Respondent in Waterford, Connecticut. The work involves calibrating, repairing, and performing surveillances on controls and instrumentation associated with the operation of the nuclear power plant. He has had many years operation experience in both the military and civilian sectors in the nuclear power field. He has, since April 1988, brought various safety concerns to the NRC and to the Occupational Safety and Health Administration (OSHA). This was done after having received "unsatisfactory" responses from NNEC. (TR 31)

DelCore enters his central work area through the south access point, where he walks through a security monitor and picks up his identity badge. He then punches into a key card system. It is then about one-quarter of a mile to his shop area - a five-minute walk. He usually works from 6:30 a.m. to 3:00 p.m. A fellow worker explained that a coffee break of 15 minutes and one-half hour for lunch are combined for a 45-minute luncheon period near mid-day. (TR 276) During the first half hour or so he usually gets his work assignment from an "upgraded" foreman -- an instrument specialist temporarily upgraded to acting foreman. Mr. Delcore alleges that the prior shop supervisor, Mr. Cross, issued a memorandum indicating he expected instrument technicians to have their work bench ready to work at 6:40. Mr. John Becker, the shop manager, told him, in September 1989, that he was expected to be ready to work at 6:30 (TR 55-56) On August 24, 1989, he arrived at his shop area at approximately 7:00 a.m. (TR 39) On this day,

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Complainant's time sheet shows he was paid from 6:30 a.m. to 5:00 p.m. (CX 5) It also indicates he was assessed one-half hour personal time, although not fixing what time of day was involved. (TR 41) The gate log (CX 6) shows that he entered the protected area through the turnstyle at 7:03 a.m. From these two documents, he concludes that he was paid for the one-half hour in the morning when he was not on site - the period he came in late on August 24, 1989.¹

Once work is assigned, Complainant would either stay in the shop or leave, as the assignment requires. The supervisors, including the upgrade, would generally have their meeting between 7:00 a.m. and 7:30 a.m. in the Library/Conference Room segment of the shop area. (TR 47) On the day in question, DelCore, as he entered the shop, saw Mr. Hayward, the acting assistant foreman. (TR 49) Later in the morning, Complainant was given a work assignment. It was not until he received his pay stub (CX 21) that he became aware that he was assessed one-half hour personal time.² Up to that time he had not been made aware of the control shop's policy in the assessment of personal time. (TR

52-53) Nevertheless, he explained that if he wanted some time off, other than vacation time or sick time, he would ask one of the assistant supervisors or one of the upgrades for permission to take personal time. Based on Mr. DelCore's testimony and that of all the other witnesses, it appears that personal time is used to arrive late or leave work early for various reasons, including personal business and social, medical, or dental appointments. Mr. Juan Davila testified, for example, that he has called to advise his supervisor he was going to arrive late. (TR 566) Others advise their appropriate supervisor they are going to leave early for personal reasons or that they will take an extended lunch hour for some reason. These requests are generally granted. On the morning of August 24, 1989, Mr. DelCore did not call to advise he was arriving late nor did he acknowledge it to Mr. Hayward when he arrived. He stated that it was customary to advise a supervisor or upgrade of one's tardiness. (TR 57) He also stated that it is the custom of tardy employees, but for several years not his, to bring in donuts and leave them where employees congregate. When that happens, a supervisor might inquire as to the identity of the donor.

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Complainant testified that on September 8, 1989, two employees came in late and were not charged any personal time. He identified them as Douglas Vining and Jim Ritchie. Upon inquiry of the latter, he was told that he had not been charged with personal time. (TR 64)

Mr. DelCore is concerned with his being charged with one-half hour personal time because it was brought up in conjunction with the review of his 1988 annual performance rating (EDR) earlier in 1989. The performance rating provides a basis, among other purposes, for an increase in an employee's hourly pay rate. (TR 66; CX 19) It is for this reason that Complainant was concerned when both the one-half hour personal time was assessed and the matter of poor communications with management was raised. These items constitute some of the criteria embraced in the EDR, which, in turn, affects his wages. (TR 93-96)

On September 20, 1989, DelCore was asked to see John Becker, the shop supervisor, who inquired about the complaint filed with DOL by DelCore in connection with the one-half hour personal time assessment. Complainant refused to discuss the matter, telling him that based on past experience when problems were first discussed with management, he found that it served only to forewarn management when he later filed a complaint with DOL, and redounded to his detriment in the outcome of the proceeding. (TR 75-76) It was then debated between them the right of DelCore to lodge complaints with government agencies and the need for Becker to know of an employee's concerns in order to manage effectively the affairs of the shop. Mr. DelCore indicated at one point that Mr. Becker believed he should be first to know of any problems before DelCore resorted to filing a complaint. (TR 80) Otherwise, DelCore's EDR would reflect that he was not a good communicator. (TR 84-86) The matter was discussed at length.

On cross-examination, Mr. DelCore admitted that up to August 24, 1989, he had been granted personal time every time he requested it "without any problem at all." (TR 106) Nevertheless, he believed he never had been charged a one-half hour increment in the past. (TR 116) Delcore received a " 03 " rating for dependability, which, on a rising scale of "01" to "05," is midway and is descriptive of one who "fully meets expectations." (CX 19) His overall rating was "04,"

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"exceeding expectations." (TR 112) This rating enabled him to receive "merit" pay during 1989. Regarding personal time, Complainant does not recall ever asking or being charged for one-half hour personal time; yet, Respondent's exhibits H4 and H20 show that he was assessed one-half hour increments of personal time on two occasions earlier in 1989. (TR 121-122) He is concerned that excessive personal time usage, being an element specifically mentioned to him in the annual EDR review, may be used to justify a poor performance rating. (TR 110)

DelCore appeared to emphasize that while he was late, he was not late by one-half hour, as alleged, disputing both the accuracy and the synchronization of the time recorded in the "turnstile printout," the clock at the gate, and the clock at the I&C shop. (TR 120-121, 223) He also admitted that while he was cognizant that Respondent had a grievance procedure in place, he chose not to utilize it, choosing to file a complaint with DOL, instead, for the above-noted reason.

He acknowledged that persons entering the shop would not be visible to supervisors standing outside Mr. Smith's office. (TR 172)

He and Becker had an extensive discussion regarding DelCore's right to complain to government agencies and the supervisor's right to know of problems so that they might be addressed. He also agreed that a memorandum memorializing the lengthy meeting was given him by Becker on October 4, 1989. This memorandum, DelCore alleges, represents a change in Becker's position. (CX 22; TR 190-191) Nevertheless, DelCore acknowledged that the meeting and the stance taken by Becker was a fair way to address the situation and to try to resolve it. (TR 194)

Complainant, on being recalled to the stand, noted that the changes by Schleicher in the time sheets for September 8, 1989, obviously occurred only after DelCore identified tardy arrivals to the DOL investigator, who then apparently revealed the identity of at least one individual to management. (TR 803) He recited portions of a DOL investigator's report to corroborate his testimony. (CX 25) (This exhibit is not physically a part of the record by agreement of counsel. (TR 834)) Mr. DelCore also testified that the time sheets were not changed until the matter was called to management's attention

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by DOL via his information to the investigator. (TR 826)

Mr. James Ritchie, an I&C specialist at Millstone who works in the same shop as Complainant, testified that he usually arrives at about 6:30 a.m., the starting time, usually has a snack, and attends to personal or company business at his desk until work is assigned. This is done by either a foreman or an upgrade at any time between 6:30 a.m. and 7:15 a.m. (TR 227) He, too, testified that supervisors usually have a department meeting from 7:00 to 7:30 each morning in the library or conference room. (This would be along a corridor running parallel to the central passageway running to the opposite side of the corridor along which DelCore's work bench or desk is located - about diagonally across the room. (RX E) He estimates the time needed to get from the gate he enters (north) to the shop as three minutes. (TR 229) He believes it would take about five minutes from the south gate. He acknowledged that people arrive late quite often but is unaware of any policy, as such, regarding the assessing of personal time for tardiness. (TR 230) He arrived at 7:23 on the morning of September 8, 1989, but was not either assessed personal time or docked any pay. He overslept that morning and "called in" to the shop. (TR 234) On September 29, 1989, this was subsequently changed by an amended time card. (TR 246; CX 13) On September 15th, without any personal time assessment or other charge, he checked out of the gate at 11:37 a.m. and returned at 12:30 p.m. The luncheon period is normally from 11:45 a.m. to 12:30 p.m. (TR 235) Again, on September 1st, he exited the gate at 6:38 p.m. but was paid to 7:00 p.m. (TR 239-240) He also noted that although he had 41 hours personal time in 1988, no one made any special note of it. Mrs. Ritchie delivered their first child during the year, and a major portion of the personal time was consumed in conjunction with his being present at the birth. His supervisor was aware of the situation. (TR 254-256) He did not consider the assessment of personal time as an adverse action. (TR 248)

Mr. Christopher Latour, another of DelCore's co-workers at the I&C shop, testified. He described his early morning routine as arriving at 6:30 a.m., pouring himself a cup of coffee, and proceeding to his work station to finish the previous day's work, if any, or discuss current events with co-workers and await a job assignment. Job assignments are usually issued during the first one-half hour of the work day

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by the upgrade or an assistant supervisor. (TR 260) Based on his observations, he has seen the supervisors gather at 7:15 a.m. for a department meeting in the conference room. (TR 261) He, too, is unaware of any policy regarding tardiness, although he is aware he should be in the shop at 6:30 a.m., the "starting time." (TR 262) He has been assessed personal time for coming in late. This has happened recently. He is unable to recall any other similar experience in the past. (TR 264) As in the case with Mr. Ritchie and Mr. DelCore, Mr. Latour's gate logs show dates of tardy arrival or early departures without any personal time being assessed. None reflected a one-half hour or more period of tardiness. (TR 280-287, 304) He does not consider the assessment of personal time to be an adverse action. He has been assessed personal time for leaving early. (TR 299-300)

He, too, acknowledged that one might enter the I&C shop late in the morning and not be observed by any supervisor. (TR 306)

Mr. William D. Dershain, an I&C specialist who has worked in Mr. DelCore's shop for about ten years, essentially corroborated the testimony of Ritchie and Latour regarding the early morning routine for employees and supervisors. (TR 309) He, too, does not consider the assessing of personal time as an adverse action. (TR 312)

Mr. Gary Johnson has worked in Complainant's shop for about eight years. He confirmed the prior witnesses' testimony regarding the regular workday hours and the lack of any specific policy about assessment of personal time for tardy individuals. He testified that whenever he is "running a little late, more than a half an hour or so, . . . I will report to my foreman and tell him I'm late and explain the reason why and would expect to be assessed personal time." (TR 315) However, he has not been charged for personal time whenever he came in late without reporting it to his supervisor. On the other hand, while he has not been charged personal time for leaving 15 or 20 minutes early, he has been charged if he left one-half hour or more early. (TR 316) Also, whenever he has come in more than one-half hour late without any prior arrangement, he has been charged with personal time. (TR 320-321)

On recall, Mr. Johnson stated that since he filed a complaint with the NRC, he believed he was the subject of

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retaliation by virtue of receiving a poor performance rating. (TR 768-782) On appeal, two of the three reasons cited were reversed by higher management, but his rating remained. (TR 793)

Mr. Robert Atkinson, an instrument and control specialist in Mr. DelCore's shop for about six years, testified he is not aware of any standing policy regarding personal time being assessed for tardiness. (TR 324) He was assessed personal time in 1988 and 1989 for tardiness of one-half hour to two hours. (TR 326) These were instances when he was either tardy and notified his supervisors upon his arrival or gave advance notice. (TR 327) He generally corroborated the testimony of others as to the rather tolerant policy of management towards personnel extending their luncheon periods to transact personal business without being assessed personal time.

Mr. Eugene Paladino, an instrumentation specialist in DelCore's shop for nearly seven years, also denied any knowledge regarding company policy in the assessing of personal time for tardiness. He has been under a physician's care, necessitating frequent absences from work, for which, with prior arrangements with supervisors, he is assessed personal time. (TR 339-334) He fails to recall any comment being made regarding use of personal time during the course of his annual EDR conference. He confirmed that there is a practice that a tardy employee brings in doughnuts. He also acknowledged that he calls to

notify management of the anticipated tardiness. (TR 351) He does not consider the assessment of personal time as an adverse act.

Mr. Patrick Kane, an I&C specialist in Complainant's shop for seven years, confirmed that normal working hours are 6:30 a.m. to 3:00 p.m. He usually starts working at his computer terminal at 6:30 and continues until 3:00. (TR 356) On occasion, he may be asked to do some shop work. He described the early morning routine of the supervisors as reviewing automatic work orders (AWOs) or trouble reports (TRs) putting them in order of priority, and assigning them to one of the members of the shop. He described the managers' meeting as taking place at 7:30 a.m. or 8:00 a.m. and lasting one-half hour. (TR 357, 367) He is unaware of any policy regarding tardiness, although he is aware of people arriving late during the first half of 1988. During the latter part of 1988 and in 1989, being enclosed in an office, he was not in a position to

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observe late-comers. He is unaware of how that was dealt with by management. If he requires time off from work to attend to personal matters, he requests it in advance, and he "usually get(s) it." (TR 360) It is charged as personal time. There is no time charged for brief - five to ten minutes - excursions to the credit union during the workday. He, too, has been charged for one-half hour segments whenever he left work early. (TR 368)

Mr. Robert Hansen, an instrument specialist in Complainant's shop for about ten years, corroborated the testimony of the other witnesses regarding the workday hours, the morning routine, and the fact that some co-workers arrive after 6:30 a.m. He, too, is unaware of any formal policy regarding tardiness, although he understands he should be ready to work at 6:30. (TR 366-367, 385) His experience is similar to the others in the application for and use of personal time to attend medical appointments or personal business. He is uncertain when, but at one time in the past three years, he was told that his use of personal time or sick time was not excessive. (TR 381) He does not consider the assessment of personal time, whenever he has asked for and received it, to be an adverse action. He believes he knows what is expected of him, and he has not abused it. Consequently, no one has ever taken the time to explain it to him. The policies are set forth to everyone from time to time prior to a shutdown of the power plant when numerous newcomers, contract personnel, come to the shop. (TR 384)

Mr. Douglas Vining, an I&C specialist, has worked for Respondent a total of about eight years, the last several of which have been in Mr. DelCore's shop. (TR 388) His testimony was similar to the other witnesses' regarding work hours and morning routine. He is aware he should be ready to work at 6:30 a.m. because he was given a time schedule. (TR 390) Although not assessed personal time on August 23, 1989, his gate log shows that he entered at 6:49 a.m. (CX 4; TR 392) On September 1, 1989, he left at 20 minutes to the hour but was paid for the time without being assessed personal time. (Cx 9; TR 392-393) On September 8, 1989 (CX 12), he was paid for eight hours but the gate log indicates he entered the access point at 7:29 a.m. (TR 394 on September 11,

1989, he was in training, and that is specially designated on the time card. (CX 14; TR 395) His experience regarding the use of personal

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time is the same as the other witnesses. He is aware he used a large amount of personal time in 1988 because of a death in the family. (TR 401) He has been told in the course of his annual performance review that his tardiness was excessive. (TR 403) Mr. Vining testified that it was his practice to tell the upgrade if he came in late. (TR 407)

Mr. Willard Hayward, a long-time employee and an I&C specialist, working in the same shop as Complainant, was the upgrade on August 25, 1989. He essentially confirmed the testimony of the other witnesses regarding starting time and the early morning routine. He, too, is unaware of any policy regarding the assessment of personal time for tardiness. He, personally, would notify his supervisor of his tardiness. As an upgrade, after checking with a foreman, he usually assigns work at about 6:40 a.m. to 7:15 a.m. This is also about the time work is assigned to him as an I&C specialist. (TR 414-418)

On August 24, 1989, he was the upgrade on duty and filled in the time card on which Mr. DelCore was charged with having one-half hour personal time. Hayward recalled that on this date he was talking with Ray Schleicher in front of the latter's office, when DelCore came in with his jacket and lunch box, which he put away in the refrigerator just a few feet from where they were standing. No greetings were exchanged nor was anything said between them and DelCore. (TR 453) He noted the tardiness and, being aware of "some friction" between DelCore and "supervision," he asked Schleicher how to treat the tardiness. Schleicher told him to enter it as personal time. (TR 426) Nevertheless, he did not consider it as a punitive action, nor did Schleicher indicate that it was intended to be so. (TR 440) He recalls that Complainant arrived a few minutes after 7:00 a.m.

Relying on instructions received from David Cross, the shop supervisor prior to Mr. Becker (who took over in March 1989), Mr. Haywood recalled that five minutes' or ten minutes' grace on both ends of the work day was a policy of the shop. (TR 428) Fifteen minutes, apparently, would be frowned upon. (TR 436)

In further describing the I&C shop, Mr. Haywood testified that there would be two technicians and about 15 specialists to whom the upgrade would assign work. There is no head count or

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other means of monitoring the comings and goings of individuals in the shop area. (TR 438) Further, based on the shop's configuration, he believes people could enter or leave

the shop without being seen. (TR 441-442) He believes the supervisors are "flexible" regarding tardiness.

Mr. Juan Davila, an instrumentation specialist at the Unit 2 I&C shop, has been employed at the shop for about three years. (TR 456) He generally corroborated the testimony of the others regarding the early morning routine of the shop. Mr. Davila, according to the gate log for August 23, 1989, entered the protected area at 6:47 a.m. without being charged with personal time. (TR 460) On September 20, 1989, although paid to 3:00 p.m., he is shown in the gate log to have been outside the protected area from 2:04 p.m. to 2:58 p.m. (TR 462-463; CX 18) He recalls being charged with one-half hour of personal time for tardiness several weeks prior to the hearing. He had called in to advise management of his anticipated tardiness. (TR 466) He, too, is unaware of any policy regarding the assessment of personal time for tardiness. (TR 468) As in the case with the other employees, he generally seeks approval of personal time off in advance, and it is generally granted.

On September 8, 1989, he was the upgrade who filled out the time card. He explained the failure, originally, to note any personal time for tardiness because he had not noticed either Vining or Ritchie come in late that day, nor had he been told they were going to be late by anyone in authority. (TR 480-481) He believes that since the instant complaint was filed, "more attention has been focused" on employee tardiness and the assessment of personal time. Although unable to give specifics, he believes that at one time in the past, he arrived one-half hour late and was not charged with personal time. (TR 490-497) The arrival time of employees was not closely monitored prior to August 1989. He was unaware of Mr. Atkinson's experience in being assessed personal time for tardiness. (TR 505) But he does recall that Atkinson's tardiness was sufficiently excessive that some fellow workers called it to the supervisor's attention. (TR 507)

Mr. Michael Brown, Director of Employee Relations, Northeast Utilities, explained the annual review procedure and its purposes, an opportunity to record an employee's

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strengths and weaknesses and to discuss their performance with supervisors. (TR 510) Poor attendance, either tardiness or absenteeism, may result in a poor performance rating with various consequences, such as the amount of merit increase one might receive. (TR 515) Brown does not construe as a negative comment the observation that an employee has used an above-average amount of sick or personal time. (TR, 520)

Mr. Raymond Schleicher has been employed by Respondent for about 15 years, about ten of which have been as an assistant supervisor of the Unit 2 I&C shop. (TR 535-536) He prefaced his testimony by indicating that prompted by Complainant's testimony regarding the possible lack of coordination of the clock at the entry gate, the gate logs, and the clock in the I&C shop, he checked these clocks with his watch, which had been checked with the time tone of a local radio station, and found them to be in harmony. (TR

536-539) I noted for the record that in the absence of any allegation that the various timing devices were specifically altered to Mr. DelCore's detriment, the matter was not an issue in the case since the times recorded by the company clocks applied to everyone uniformly. (TR 540) Mr. Schleicher testified that once he is made aware, he uses one-half hour as the break point at which he assesses employees personal time for tardiness. (TR 546) The leave policy at the shop is very liberal. Nevertheless, employees are encouraged to call a supervisor if they anticipate any problem arriving at work on time. This is usually discussed before outages, when the staff is augmented with persons who are employees of contractors retained to assist during those periods. (TR 548-549) Personal time is allowed for a wide range of personal needs of the employees, and no set number of hours has been established as a limit. As an example of this, Schleicher prepared a list of personal time use by shop employees for the period January 1, 1989, to October 21, 1989. The totals ranged from 60 hours to one hour. Mr. Delcore had used 12 hours during this period. (TR 553; RX J) To advance the position that "dependability" ratings in employee's EDR are unrelated to use of personal time, Mr. Schleicher explained that he compiled data used in RX K, an exhibit tending to show that for calendar year 1988, there was no clear relationship between an employee's dependability rating and his use of personal time. (TR 555)

The early morning routine in the shop as described by this

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witness is not significantly different from the consensus of the other witnesses, from his standpoint. He reviews plant activities and reports of events occurring the preceding night, conversing with individuals in planning and management. This is often done outside his door, which does not give him a clear view of the entrance door to the shop. No formal roll is taken of employees. He also confirmed that during a portion of 1989, an upgrade would be used to keep the time sheet, although this task has since been reassigned to Peter Smith, the junior assistant supervisor. Schleicher then signs the pay slips before they are sent to payroll. Other than checking the arithmetic, he does not check the entries made on pay slips in detail, making corrections only when he has contradicting personal knowledge. (TR 565) On August 24, 1989, he and Hayward, who was an upgrade at the time, were standing in the central passageway near the juncture of the administrative section and the technical area where the coffee machine and refrigerator are located and saw Complainant walk in the shop, walk past the two men, place his lunch in the refrigerator, and then walk back to his work area. Nothing was said by either Hayward, Schleicher, or DelCore. (TR 567) After a while, he went to DelCore and gave him an assignment. He had gone to Mr. DelCore's work area at about 6:50 a.m. to give him the assignment, but he was not there. A few minutes later, he asked Hayward of DelCore's whereabouts. When DelCore arrived, Schleicher looked at his watch and noticed the time to be 7:11 a.m. (TR 568-569) When Hayward asked how DelCore's time should be recorded, Schleicher told him as personal time. In this connection, Mr. Schleicher testified that while he tolerates occasional early departures, up to 15 minutes, for good reasons, he assesses 30 minutes of personal time when the employee's absence

reaches that point. (TR 572) He cited several instances of employees' being assessed one-half hour personal time, one being Mr. DelCore in January and July 1989. (TR 575-577)

Turning his attention to the time sheet for September 8, 1989, CX 12 and its subsequent amendment, CX 13, Mr. Schleicher indicated that sometime during the week of September 11th, in the course of a conversation with John Becker, he learned of the instant complaint being filed, and he was asked whether there had been any others tardy. He recalled that Mr. Ritchie had been and asked Smith to check on it. This was done via a review of the gate logs, and eventually the entries for

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September 8th were obtained, which revealed Ritchie had arrived at 7:15 a.m. He was assessed one-half hour personal time. (TR 582-584) He has made corrections of time cards in the past. He does not consider the charging of personal time to have negative connotations and does not consider it to have a negative impact of any performance evaluation. (TR 586) He has not been approached by Mr. DelCore regarding the assessment of personal time. He also explained that individuals leave the protected area during the day for a wide variety of company authorized purposes beyond the reasons given by other witnesses. (TR 539-592) Under cross-examination, Schleicher reaffirmed that it was his practice to charge those persons arriving more than 30 minutes late with one-half hour of personal time, a policy he has adhered to for more than two years. (TR 604-606)

The witness was next directed to review CX 23, an Employee Personal Interview Statement, dated October 5, 1989, which he signed, and asked to explain the statement therein, attributed to him, that personal time is assessed to individuals who are more than 15 minutes late. While the response was lengthy, the explanation was unclear. (TR 609-629) I interpret the witness's explanation to be that he officially tolerates a 15-minute leeway but does not begin charging personal time until 30 minutes have passed. After the first one-half hour, time is assessed in quarter-hour segments.

On being recalled by Complainant's counsel, Mr. Schleicher explained the changes in the time sheet for the week ending September 8, 1989, being changed a second time, on December 4, 1989, to reflect that one hour of personal time was being assessed for Mr. Vining. (CX 24; TR 762-764) This was in addition to the earlier change of September 29, 1989, pertaining to Mr. Ritchie's time.

Mr. Peter Smith, an assistant supervisor at the I&C shop, Unit 2, for nearly two years and an employee of Respondent for nearly ten years, testified that he knows and has worked as a technician along side Complainant. He generally corroborated Schleicher's testimony in his description of the shop's early morning routine. He also confirmed that the use of upgrades stopped in the fall of 1989. (TR 335-338) He reviewed CX 12 and CX 13 and agreed that Juan Davila was the upgrade who made out the time sheet on September 8, 1989. Smith was not aware

of Ritchie's tardiness on that day. (TR 642) The issue of Mr. Vining's tardiness on that same day did not arise until he was interviewed by a DOL investigator. (TR 645) Then the gate logs were checked to ascertain the date of arrival, and an appropriate change was sent to the timkeepers. (TR 647; CX 24) He corroborated Schleicher's testimony that an individual would not be assessed personal time until he was at least one-half hour late. (TR 686) This was the Practice when he was a technician and specialist and is the present practice. (TR 650) Although he was attending a training program on August 24, 1989, he would have assessed one-half hour personal time if the same circumstances had presented themselves. In a review of time sheets covering the period from August 1 through September 20, 1989, Mr. Smith indicated that no one was ever assessed personal time of less than one-half hour. (TR 669-670) Since the outage of October/November 1989, tardiness in excess of 15 minutes has been assessed. (TR 687)

Mr. John Becker, the I&C shop, Unit 2, manager (formerly called supervisor) testified that he began his career with NNEC in 1980 as an associate engineer and was eventually promoted to head the Unit 2 I&C shop in March 1989. (TR 701) He recalled his conversation with Complainant on September 20, 1989. The purpose of the conversation was to discuss what Becker believed to be a change in DelCore's past practice of bringing problems to his attention for possible resolution. He expressed his concern in not being told of DelCore's problem in the assessment of personal time. DelCore told him that when that procedure was followed in the past, he was dissatisfied with the results, believing "roadblocks" were placed in the way of DOL investigators, and, therefore, intended to bring his problems regarding labor discrimination directly to DOL. Becker would learn of the matter via NNEC 's attorneys. (TR 704-706) Mr. DelCore felt that as long as his employer continued to deny it was discriminating against him, he believed it necessary to register his complaints directly to a government agency. Mr. Becker alleges he told Mr. DelCore that DelCore could go to DOL at any time but that it was still "important that he bring problems to me so I could try and resolve them." (TR 707) DelCore allegedly responded that the discrimination problems were not within the I&C shop but higher up in management. Becker specifically denied telling DelCore he had to register complaints with him before going to DOL. (TR 709) This position was stated in a memorandum to DelCore,

dated October 4, 1989. (RX I) The memorandum was drafted to make Becker's position "perfectly clear" as to his understanding of the employee's rights and obligations. It is attached hereto. (Attachment No. 1) The memorandum emphasizes that: DelCore has the right to report "problems" to government agencies, problems should be brought to Becker or his subordinates, this latter step would be preferred as a first course of action but is not a requirement. Becker also suggests the use of an inhouse agency established to hear complaints of employees who are "uncomfortable" in going to their own supervisors.

Lastly, the memorandum notes that while DelCore had been assessed to be a "good communicator" in the past, his change in communications pattern makes resolution of problems more difficult, and he, DelCore, is "encouraged" "to consider a more direct approach" with his concerns. (RX I) He reviewed a draft of the memorandum with Complainant, considered his comments and then revised it on his word processor, signed it, and gave a copy to Mr. DelCore in person. (TR 744-5) Becker acknowledged that he had also conferred with counsel and others in the company before drafting the memorandum. (TR 745-752) He does not expect the meeting would have an adverse effect on Complainant's rating.

Becker testified that while he, at times, is made aware by DelCore of various technical and other concerns, these are later brought to outside agencies. On other decisions, he is made aware of technical concerns when the agency personnel bring them to his attention. (TR 728-734) Nevertheless, he believes he can, and does, communicate effectively, with Mr. DelCore. He would not hold any hostility against anyone, including Complainant, who would bring complaints to outside agencies. (TR 738)

Discussion and Conclusions

This case was brought under the employee protection provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. 5851 ("the Act"). The statute provides that:

. . . no employer subject to the provisions of (the Act) . . . may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee . . . engaged in any of the activities specified in subsection (b) below:

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- (b) Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee who has
- (1) commenced, or caused to be commenced a proceeding under (the Act) or a proceeding for the administration or enforcement of any requirement imposed under such federal statute;
 - (2) testified or is about to testify in any such proceeding; or
 - (3) assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of (the Act).

The employee protection provision, being remedial in nature, should be broadly construed. *Deford v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

For Complainant to establish a *prima facie* case, he must prove, by a preponderance of the evidence, that:

1. The party charged with discrimination is an employer subject to the Act;
2. That the complainant was an employee under the Act;
3. That the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment;
4. That the employee engaged in protected activity;
5. That the employer knew or had knowledge that the employee engaged in protected activity; and

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6. That the retaliation against the employee was motivated, at least in part, by the employee's engaging in protected activity.

Here, the parties agree as to items 1, 2, 4, and 5. I conclude Complainant has failed to show that element No. 3 exists or took place. The sixth element of Complainant's *prima facie* case has also not been shown.

The evidence clearly demonstrates, and I find, that Mr. DelCore arrived at work (passed through the gate at the south access point) at 7:03 a.m. (RX F) He proceeded to the I&C shop and was seen to enter some time thereafter. (TR 440, 568-569) While the precise times are disputed by DelCore, his assertions are not convincing and are rejected. Obviously, even if the clocks were some seconds off, all employees were subject to the same time measuring devices and the times they reflected. The parties agree, however, that he entered without offering any excuse for his tardiness, despite the fact the upgrade and one of his supervisors were nearby.

Complainant asserts that his being assessed one-half hour personal time for the tardiness was not the usual practice and was motivated as retaliation for his engaging in protected activity. This has not been proven. Of the samples cited to show disparate treatment, there is no instance shown where an individual arrived more than one-half hour late, was seen by an upgrade or supervisor, offered no excuse, either prior to or at the time of the tardiness, and was not charged with personal time. While some of DelCore's co-workers were shown to have been more than 30 minutes late, it was not established they were seen arriving late by an upgrade or supervisor. In contrast, it appears usually they were at least courteous enough to call in advance. Given the fact that the required hours of service were apparently, casually observed and enforced, I can understand different treatment being accorded one who shows sufficient concern about his tardiness so as to call his supervisor to advise him of the circumstances. Complainant has failed to show he was singled out, given the circumstances surrounding his tardiness, in contrast to the others. For example, Robert Atkinson testified he was assessed personal

time of as little as one-half hour for tardiness in 1988 and 1989. (TR 326) In the case of Douglas Vining, there

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is no showing his tardiness of approximately one hour on September 8, 1989, was observed by Schleicher or Davila and purposely ignored. Mr. Ritchie's tardiness was also undeducted at the time. (TR 480-481) The time cards were later corrected, when Schleicher learned of the situation. Ritchie testified he "called in" but does not specify to whom he spoke. (TR 234) Davila testified he was unaware of Ritchie's tardiness. I cannot conclude from this that Ritchie was treated differently from Complainant. Similarly, while Vining testified he usually tells a supervisor of his tardiness, he failed to specify to whom he reported his tardiness on September 8, 1989. (TR 407) As a matter of fact, Vining had been warned about his repeated tardiness in connection with his 1988 EDR. (TR 403) While Complainant, in his brief and at trial, suggests some sinister purpose behind the subsequent changes in the time cards of these two individuals by Schleicher sometime after the event, I cannot accept the evidence as proving anything other than a correction was made, based on new information, of a past error. The date the corrections were made was, in each instance, clearly noted on the card. (CX 24) All in all, reviewing the testimony of all the witnesses and their demeanor, my clear impression and conclusion is that Complainant was treated with equal liberality in his daily comings and goings as his fellow workers.

Next, we come to the issue raised by Complainant regarding the allegation that his office manager, John Becker, ordered him to report complaints to management before going to a government agency or suffer the consequences of a poor performance rating for "communicating."

This is a more difficult aspect of the case. It is difficult to know exactly what was said by whom during that first meeting. It is a rather nice point to communicate and to understand -- the balancing of management's need to know so as to address matters within its legitimate domain and an employee's statutory right to register complaints to a government agency. As to what was said, it is Mr. DelCore's word against that of Mr. Becker. In the circumstances, I cannot say which was the better recollection. Consequently, Complainant has not met his burden. As to the October 4th memorandum purporting to memorialize what was said, obviously, the parties also disagree as to its accuracy and, therefore, is

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not dispositive of the issue.

To the extent that the memorandum represents Becker's policy regarding DelCore's rights and duties, it appears to tread the fine line rather well in delineating what Mr.

DelCore can do by way of communicating with government agencies and what he should do in satisfaction of his responsibilities as an employee.

RECOMMENDED ORDER

The complaint is DENIED.

ANTHONY J. IACOBO
Administrative Law Judge

Boston, Massachusetts

AJI:ln

Attachment: Memorandum

ATTACHMENT 1

CONFIDENTIAL

October 4, 1989

To: Don DelCore Sr.
Instrument Specialist - Unit 2

From: John D. Becker
I&C Supervisor - Unit 2

Subject: Communications

On September 20, 1989 we met in my office and had a good discussion on the issue of communication with your supervision. I want to follow up with this memo to make sure two points we discussed are clear.

1. You have the right to report problems to outside agencies such as the NRC or Department of Labor at any time you feel is appropriate. I encourage you to do this whenever you feel it is appropriate.
2. I do expect you to bring what you perceive as problems to my attention, either directly or through Ray or Pete. Although I think it is desirable, you need not report your concerns to supervision before reporting them to any outside agency.

If you feel you would not get an adequate response from us, I suggest you consider contacting the Nuclear Concerns Program Manager at extension 4349. This program

provides another communications path which is useful when an employee feels uncomfortable about going to his supervision with a concern.

Don, generally, your 1989 performance has demonstrated your ability to be a good communicator. I'm concerned that recent changes in your willingness to communicate with me on important issues and your stated intention not to directly inform your supervision of your discrimination concerns makes their resolution exceedingly difficult. I encourage you to consider a more direct approach so that I can achieve resolution of your concerns.

c: R. O. Schleicher
P. L. Smith

[ENDNOTES]

¹Complainant alleges that based on his own watch's time, which he checks daily with a radio time tone, the gate's clock is inaccurate by some minutes. He also believes it is not consistent with the clock in the shop. These allegations are contradicted by Mr. Raymond Schleicher, an assistant supervisor.

²Mr. Michael Brown explained that "personal time" is discretionary and is granted to employees to allow an individual to fulfill personal obligations without using vacation time. (TR 5, 21-522)